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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

No. 138...

FRANCIS DOLL,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit and

BRIEF IN SUPPORT THEREOF.

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COMMISSIONER OF INTERNAL REVENUE,
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PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF MATTER INVOLVED.

This case challenges the opinion and judgment of the United States Circuit Court of Appeals, Eighth Circuit (R. 140), affirming the judgment of the Tax Court of the United States, 2 T. C. 276 (R. 34), styled as above and not as yet reported, denying refunds to petitioner for overpayments of income tax for the years 1937, 1938 and 1939.

The case involves a partnership started in 1932 between petitioner and his wife, wherein the judgment complained of taxes all the income thereof to petitioner as his personal earnings, when both parties, working through the years, brought up the business from a small beginning to one of considerable proportion.

Petitioner complains of the interpretation of Sec. 22 (a) of the Revenue Acts of 1936 and 1938, 26 U. S. C. A., Internal Revenue Acts, pages 825, 1008, defining gross income, as set forth in the opinion of the Circuit Court of Appeals as applied to these facts.

The case involves a failure to give full faith and credit to the declaratory judgment of the Circuit Court of St. Louis County, Missouri, setting forth the property rights of the partners, contrary to Article IV, Section 1, of the Constitution of the United States.

Prior to 1932 the petitioner was in business with his brother Antonio Doll, in Cuba, selling shoes (R. 52). Due to a political uprising, he came to the United States, became a citizen and married (R. 47). In view of conditions in Cuba he had to look for other markets (R. 47). The latter part of 1932 he went to Puerto Rico to find out the kind of shoes merchants were buying, and found it was impossible to cover that territory without help, and on December 15, 1932, formed a partnership with his wife as she was continually working with him (R. 48, 53, 61). He and his wife drafted and typed the agreement, using the name St. Louis Trading Company (R. 89, Pet. Exhibit 4), without outside advice (R. 68). Their business was selling American made shoes on a purely commission basis, paid by the various manufacturers, and the partnership paid their own expenses (R. 48, 49). No stock was kept on hand, only samples (R. 65).

After the political situation settled down in Cuba, he then went back to Cuba on trips to sell shoes (R. 48). His wife accompanied him on several trips to Cuba and Puerto

Rico, and assisted him (R. 48, 55), keeping records and writing orders. Mr. Mitchell, his wife's brother, was with the company for a while, trying to develop Puerto Rico on St. Louis beer, but this did not last long and never earned any money (R. 53).

A bank account was opened in the name of St. Louis Trading Company at the start of the partnership (R. 53) and still exists in that name, and all checks received are deposited in that account (R. 56). During 1937 to 1939 the business office was at 1515 Washington Avenue, St. Louis, Missouri (R. 49), and the telephone was in the name of the company (R. 56), and during those years commissions were received from forty-six (46) different manufacturers (R. 80). Checks were received payable to F. Doll, Francis Doll or St. Louis Trading Company (R. 49, 69, 81). Most of the agreements with manufacturers were oral, except one with Hamilton-Brown Shoe Company (R. 49, Resp. Exhibit D 119). The International Shoe Company, St. Louis, was aware of the existence of the partnership St. Louis Trading Company, and had dealt with them since 1932 (R. 70); likewise Brauer Bros. Shoe Company (R. 81). By agreement, the wife was to draw a salary of two hundred dollars a month (R. 48) as part of her portion, but there was never just two hundred dollars drawn out (R. 60, 61). The wife kept the records and books, took care of the correspondence, all of the filing of statements and invoices, wrote up orders, and when petitioner was away from home, took care of all customers coming to St. Louis, conducted them to factories, saw that the merchandise sold was shipped, made reservations for them, entertained them, and when petitioner was with customers, took care of the office (R. 56, 57, 58), and spent whatever time was necessary in the office. In addition, when foreign buyers arrived and petitioner was away, the wife secured an interpreter and conducted them to the different manufacturers and introduced them. She never sold shoes at such times because the house salesmen were

there to wait on customers that were brought in (R. 62, 65). These foreign buyers came to petitioner's home and were kept there and were entertained by his wife (R. 62). The entertainmnt and guiding of foreign buyers is an important part of the business of selling foreign buyers for export (R. 66, 70, 71).

The petitioner stated that hard work by him and his wife was what brought the business (R. 55).

In the account book all commissions received were entered under "cash received" column by items (R. 58). Every check written was on the expenditure page, which showed "To Francis Doll, personal," and "To Cornelia Doll, personal," or "To Francis Doll and Cornelia Doll, jointly" (R. 64).

The wife was authorized to write checks on the company account, and did so at first, but stopped that practice as it was not satisfactory for both parties to write checks, especially when petitioner was away on a trip (R. 61).

On October 23, 1941, Cornelia Doll, wife of petitioner, filed a suit in the Circuit Court of St. Louis County, Missouri, against petitioner, for a declaratory judgment to construe and determine her property rights under the partnership agreement, as she wanted to know what her rights were as a wife and as a partner because the Government was not recognizing the partnership (R. 67-94). Such suit showed the net income of the partnership for the year 1933 to be very small, $2,366.31, but increasing each year until the year 1940, when the net income was $19,347.85, and also showed that through the years Cornelia Doll had drawn out $19,008.02 and that petitioner had drawn out $18,506.70 (R. 98, 99). Thereafter a judgment was rendered in said court adjudging Cornelia Doll and petitioner equal partners, setting forth the amounts each had drawn individually, the amounts drawn jointly, the purchase of a home in the names of Cornelia Doll and petitioner from partnership funds, the amount due petitioner to make said with-

drawals equal, together with the amount still on hand in the partnership account (R. 105-110).

Neither petitioner nor his wife were familiar with income tax law or requirements and made their original returns on the advice of a bookkeeper, not an expert accountant. For the tax years involved this bookkeeper made out their separate returns executed by petitioner and his wife (R. 47-68). Petitioner's returns were made out, "Francis Doll trading as St. Louis Trading Company," for the years in question (113, 115, 117, Resp. Exhibits A, B, C), showing entire income of the business as his (R. 43). In 1940 an expert accountant was consulted by petitioner in connection with claims for social security taxes, and an examination of the books and business brought to the accountant's attention the partnership agreement (R. 45). The accountant prepared and filed amended returns for petitioner for the years in question (R. 43, 44, 45, Pet. Exhibits 1, 2, 3, R. 83, 85, 87). Deficiencies were assessed and requests for refund were denied by the Commissioner (R. 15-20). Petition for review was filed with the Tax Court June 13, 1941, within the time provided by law (R. 4). The Tax Court affirmed the Commissioner (R. 23-34) on June 25, 1943. On September 3, 1943, within the time provided by law, petition for review by the Circuit Court of Appeals for the Eighth Circuit was filed (R. 35). Thereafter the matter was argued and submitted to the latter court, which rendered its opinion and judgment on April 24, 1945 (R. 140-151). Motion for rehearing was duly filed May 7, 1945 (R. 153), and denied May 11, 1945 (R. 167). Within the time provided by law, on May 21, 1945, petitioner filed his motion to stay mandate for purpose of filing application for writ of certiorari to this Court (R. 167). On May 25, 1945, order staying issuance of mandate was entered staying mandate for thirty days (R. 168), provided a certificate from Clerk of the Supreme Court was filed with Clerk that

such petition had been filed, within said period, and said stay to continue until final disposition by Supreme Court.

In its opinion the Court held:

1. That the partnership was proper under Missouri law.

2. That it was not necessary to pass on the force of the Circuit Court judgment.

3. That from an analysis of "all the circumstances attendant on its creation and operation" (Helvering v. Clifford, 309 U. S. 331, 335, 60 Sup. Ct. 554, 84 L. Ed. 788), "there was no substantial change in petitioner's economic position" (Clifford case, page 336), and that petitioner was therefore taxable for all the partnership income.

This is a petition for certiorari to review said opinion and judgment under authority of 28 U. S. C. 347 a (Jud. Code, Sec. 240 Amended), and 26 U. S. C. 1141 (53 Stat. 164).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. This case presents questions of the first importance relating to partnerships of husband and wife, where each worked since the formation of the partnership, as to the interpretation of Sec. 22 (a) of the Revenue Act as applied to such working partnership, and which has not heretofore been passed on by this Court. Section 22 (a) of the Revenue Act is as follows:

> "Sec. 22. **Gross income.**
>
> "(a) General definition.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or deal-

> ings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *"

An authoritative decision on the question by this Court is of great importance, not only to this petitioner but to the Federal Government, as well as to the numerous business partnerships of husband and wife and children now existing in this country. This is evidenced by the many divergent opinions of the Tax Court and the various Circuit Courts of Appeal where family relations are involved as to whom the income is taxable.

2. The opinion and decision has decided this important question of law and its application in a way that is probably untenable under decisions of this Court. We refer to:

> Lucas v. Earl, 281 U. S. 111, 50 S. Ct. 241, 74 L. Ed. 731;
> Burnet v. Leininger, 285 U. S. 136, 141, 52 S. Ct. 345, 76 L. Ed. 665;
> Helvering v. Horst, 311 U. S. 112, 119, 61 S. Ct. 144, 85 L. Ed. 75;
> Helvering v. Clifford, 309 U. S. 331, 336, 60 S. Ct. 544, 84 L. Ed. 788.

It should be decided by this Court whether the general interpretations taken by the Circuit Court of Appeals from the above cases should be applied to working business partnerships of husband and wife or children, such as was done in the opinion of the court.

3. The decision is in conflict with those of other Circuit Courts of Appeal as to whom such income is taxable in partnership and similar cases wherein it was held that the

rule as set out in Lucas v. Earl, supra, and Burnet v. Leininger, supra, did not apply, as follows:

Commissioner v. Olds, 60 Fed. (2d) 252 (6th);
Armstrong v. Commissioner, 143 Fed. (2d) 700 (10th);
Champlin v. Commissioner, 71 Fed. (2d) 23 (10th);
Hall v. Burnet, 54 Fed. (2d) 443 (C. C. A. D. C.), certiorari denied 285 U. S. 552;
Rose v. Commissioner, 65 Fed. (2d) 616 (6th);
Humphreys v. Commissioner, 88 Fed. (2d) 430 (2nd);
Commissioner v. Montgomery, 144 Fed. (2d) 313 (5th);
Commissioner v. Giannini, 129 Fed. (2d) 638 (9th);
Kell v. Commissioner, 88 Fed. (2d) 453 (5th);
Bowers v. N. Y. Trust Co., 9 Fed. (2d) 548 (2nd) (decided prior to Lucas v. Earl).

4. The Circuit Court of Appeals also clearly erred in its opinion by holding that the various ultimate conclusions and questions involved were restricted for their review (R. 151), contrary to applicable decisions of this Court holding that ultimate conclusions and questions involved in such cases were questions of law or mixed questions of law and fact, which decisions, among others, are as follows:

Helvering v. Tex. Penn Oil Co., 300 U. S. 481, 491, 57 S. Ct. 569, 81 L. Ed. 755;
Helvering v. Ranken, 295 U. S. 123, 131, 79 L. Ed. 343, 55 S. Ct. 732.

5. The decision, to the extent that it fails to accord full faith and credit to the judgment of the Circuit Court of St. Louis County, Missouri, contrary to Article IV, Section 1, of the Constitution of the United States, is probably in conflict with applicable decisions of this Court, in the following cases, among others:

Freuler v. Helvering, 291 U. S. 35, 45, 54 S. Ct. 308, 312, 78 L. Ed. 634;

Blair v. Commissioner, 300 U. S. 5, 10, 81 L. Ed. 465, 469, 57 S. Ct. 330;
Sharp v. Commissioner, 303 U. S. 624, 54 S. Ct. 748, 82 L. Ed. 1087.

6. The opinion of the Court of Appeals having held that the parties had a right to contract and enter said partnership, and having failed to give it any force or effect, denied petitioner the rights to which he was entitled under the contract and the facts, contrary to the Fifth Amendment to the Constitution of the United States, in that petitioner is hereby deprived of his property rights without due process of law.

In the interest of brevity (Sup. Ct. Rule 38, p. 2) petitioner is not setting forth all the points which will be presented and urged at the argument on the merits of the case, should this Court see fit to grant the writ; but in order to comply with the rule of this Court which requires that all issues upon which decision is requested be set forth in the petition for certiorari (Ganning v. Cooley, 281 U. S. 90, 98), your petitioner here refers to and incorporates into this petition all of the matters presented in his assignment of errors on the appeal to the United States Circuit Court of Appeals, Eighth Circuit (R. 39), with the same force and effect as if set out in full herein.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court for its review and determination a transcript of the record and proceedings in the case on its Docket No. 127,773, Francis Doll, Appellant, v. Commis-

sioner of Internal Revenue, Respondent; and that the decision and judgment of said Court be reversed; and for such further orders as may seem meet and proper.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION.

The opinion of the Circuit Court of Appeals, Eighth Circuit, has not as yet been reported, but appears on page 139 of the Record; the Tax Court opinion is officially reported in 2 T. C. 276 and appears at pages 23-35 in the Record.

II.

JURISDICTION.

The judgment to be reviewed was entered April 24, 1945 (R. 151). Motion for rehearing was filed May 7, 1945 (R. 153). Motion for rehearing was overruled May 11, 1945 (R. 167). Petitioner's motion to stay mandate by reason of intention to file application to the Supreme Court of the United States for writ of certiorari was filed May 21, 1945 (R. 167), and on May 25, 1945, the Circuit Court of Appeals entered an order staying the mandate for thirty days if within said period there was filed with the Clerk of the Court of Appeals a certificate of the Clerk of the Supreme Court that a writ of certiorari had been filed, and in such event the stay was granted until final disposition by the Supreme Court (R. 168).

This Court has authority to grant certiorari by virtue of 28 U. S. C. 347 a (Jud. Code Sec. 240 Amended) and 26 U. S. C. 1141 a (53 Stat. 164).

III.

GROUNDS ON WHICH JURISDICTION IN INVOKED.

1. The case presents a question of prime importance in Federal law as to the interpretation and application of Sec. 22 (a) of the Revenue Act to a business partnership of husband and wife where there was originally no established business and where each worked in the business as to whether all the income of the partnership is taxable to the husband. Sec. 22 (a) of the Revenue Act of 1936 and 1938, 26 U. S. C. Internal Revenue Act, pages 825-1008, is as follows:

> "Sec. 22. **Gross Income.**
>
> (a) General definition.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *."

The Court taxed all of the income under this Section to the husband in its opinion (R. 139). Petitioner contends that half of the income should be taxed to each partner. This important question as to the taxability of the income received by family working partnerships has not heretofore been passed on by this Court and is a Federal question of far reaching force and importance that should be settled by an authoritative and clear decision by this Court. It is important to this petitioner as well as to every working partnership of members of a family and to the federal government. The question is not at all settled by Lucas v. Earl, 281 U. S. 111, 50 S. Ct. 241, 74 L. Ed. 731,

or by Burnet v. Leininger, 285 U. S. 136, 52 S. Ct. 345, 76 L. Ed. 665. The many divergent opinions of the various circuit courts of appeal where family partnerships are involved lends force to the importance of this Court passing upon this question.

2. The opinion and decision has decided the above important question of law and its application in a way that is not in accord with, and probably untenable under applicable decisions of this Court, and goes far and beyond the import of those decisions when applied to the facts in this case. The decisions referred to are:

Lucas v. Earl, supra;
Burnet v. Leininger, supra;
Helvering v. Horst, 311 U. S. 112, 61 S. Ct. 144, 85 L. Ed. 75;
Helvering v. Clifford, 309 U. S. 331, 60 S. Ct. 544, 84 L. Ed. 788.

3. The decision is in conflict with those of other circuit courts of appeal as to whom the income is taxable under Section 22 (a) of the Revenue Act in the same or similarly related partnerships. The decisions of other circuit courts of appeal referred to are as follows:

Commissioner v. Olds, 60 Fed. (2d) 252 (6th);
Armstrong v. Commissioner, 143 Fed. (2d) 700 (10th);
Champlin v. Commissioner, 71 Fed. (2d) 23 (10th);
Hall v. Burnet, 54 Fed. (2d) 443 (C. C. A. D. C.), certiorari denied 285 U. S. 552;
Rose v. Commissioner, 65 Fed. (2d) 616 (6th);
Humphreys v. Commissioner, 88 Fed. (2d) 430 (2nd);
Commissioner v. Montgomery, 144 Fed. (2d) 313 (5th);
Commissioner v. Giannini, 129 Fed. (2d) 638 (9th);
Kell v. Commissioner, 88 Fed. (2d) 453 (5th);
Bowers v. N. Y. Trust Co., 9 Fed. (2d) 548 (2nd) (decided prior to Lucas v. Earl).

4. The decision is contrary to Article IV, Sec. 1, of the Constitution of the United States in failing to accord full faith and credit to the judgment of the Circuit Court of St. Louis County, Missouri, construing and determining the property rights of the petitioner, and is thereby in conflict with the applicable decisions of this Court in the following cases, among others:

Freuler v. Helvering, 291 U. S. 35, 45, 54 S. Ct. 308, 312, 78 L. Ed. 634;
Blair v. Commissioner, 300 U. S. 5, 101, 81 L. Ed. 465, 469, 57 S. Ct. 330;
Sharp v. Commissioner, 303 U. S. 624, 54 S. Ct. 748, 82 L. Ed. 1087.

IV.

STATEMENT OF THE CASE.

The case involves deficiencies assessed against petitioner by the Commissioner of Internal Revenue for the years 1937, 1938 and 1939, denial of refunds requested by petitioner from the Commissioner for those years, involves an interpretation and application of Section 22 (a) of the Revenue Act, supra, as applied to the working family partnership of petitioner and his wife, and further involves a failure to give full faith and credit to the judgment of the Circuit Court of St. Louis County, Missouri, setting forth the property rights of the partners (R. 105). The other facts in the case have been stated in the preceding petition, page 2 et seq.

V.

SPECIFICATION OF ERRORS.

1. The Court erred in applying the rule in Lucas v. Earl, supra; Burnet v. Leininger, supra, and the general holdings in Helvering v. Horst, supra, and Helvering v. Clifford, supra, to a working partnership of husband and wife, where at the inception of the partnership there was no established business, and in holding that there was no substantial change in petitioner's economic position. Such holding goes far and beyond the intention of Congress in enacting Section 22 (a), supra, and far beyond the purport of the four cases just above cited. The decision is contrary to the following cases in other circuits:

Commissioner v. Olds, 60 Fed. (2d) 252 (6th);
Armstrong v. Commissioner, 143 Fed. (2d) 700 (10th);
Champlin v. Commissioner, 71 Fed. (2d) 23 (10th);
Hall v. Burnet, 54 Fed. (2d) 443 (C. C. A. D. C.), Certiorari denied 285 U. S. 552;
Rose v. Commissioner, 65 Fed. (2d) 616 (6th);
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Commissioner v. Montgomery, 144 Fed. (2d) 313 (5th);
Commissioner v. Giannini, 129 Fed. (2d) 638 (9th);
Kell v. Commissioner, 88 Fed. (2d) 453 (5th);
Bowers v. N. Y. Trust Co., 9 Fed. (2d) 548 (2nd) (decided prior to Lucas v. Earl).

2. The Court erred in failing to accord full faith and credit to the judgment of the Circuit Court of St. Louis County, Missouri, which adjudged and determined the property rights and interests of the petitioner, contrary to:

Freuler v. Helvering, 291 U. S. 35, 54 S. Ct. 308, 312, 78 L. Ed. 634;

Blair v. Commissioner, 300 U. S. 5, 81 L. Ed. 465, 469, 57 S. Ct. 330;
Sharp v. Commissioner, 303 U. S. 624, 54 S. Ct. 748, 82 L. Ed. 1087.

3. The Court erred in holding that the various conclusions and questions involved decided by the Tax Court were restricted for their review and binding on them, and is contrary to applicable decisions of this Court holding that such conclusions and questions were questions of law or mixed questions of law and fact and were reviewable.

Helvering v. Tex. Penn Oil Co., 300 U. S. 481, 491, 57 S. Ct. 569, 81 L. Ed. 755;
Helvering v. Ranken, 295 U. S. 123, 131, 79 L. Ed. 343, 55 S. Ct. 732,

and is contrary to the Court's own previous ruling in U. S. v. Pierce, 137 Fed. (2d) 428, 431 (8th Circuit).

4. When the undisputed facts show that there was no established business at the inception of the partnership, and when under Missouri law husband and wife have a right to contract a partnership, as the court held, and when both partners work in the business in their particular fields, the holding by the court in adopting the opinion of the Tax Court that the wife contributed no services to the partnership but merely worked on a salary (R. 32, T. C. opinion) is directly in conflict with the oral and documentary evidence, and such holding by the court in failing to give the partnership contract any force and effect, denies to petitioner the rights to which he was entitled under the contract and the facts, contrary to the Fifth Amendment to the Constitution of the United States, in that petitioner is deprived of his property rights without due process of law.

VI.

ARGUMENT.

1. The importance of an authoritative interpretation and application of Section 22 (a) of the Revenue Act to working partnerships.

In this case there was no established business when the partnership was started, December 15, 1932 (R. 47, 48, 53, 61). The Record shows, pages 98 and 99 (Petitioner's Exhibit 5, R. 91), that beginning December 15, 1932, and ending on December 31, 1933, the first year, the net income from the business was $2,366.31; that the following year the net income was $4,446.26, and that it gradually increased through the years until for 1940 the net income was $19,347.85; that each partner made cash withdrawals as follows:

Calendar Year	To Petitioner Personal	To Cornelia Doll Personal	To Petitioner and Cornelia Doll, Jointly
1934	$ 1,106.31	$ 1,031.63	$ 4,217.69
1935	957.51	1,690.00	2,539.25
1936	188.39	1,963.81	6,218.56
1937	6,119.41	3,395.00	2,502.55
1938	1,672.43	2,396.17	1,783.04
1939	1,736.04	3,333.52	16,462.26
1940	6,726.61	5,197.89	2,691.26
Totals:	$18,506.70	$19,008.02	$36,414.61

These total figures were shown in the judgment rendered by the Circuit Court of St. Louis County, Missouri (R. 107).

The petitioner testified he could not cover the territory of Puerto Rico without help, and formed the partnership (R. 48), and that after the political situation settled down he then went back to Cuba to sell shoes (R. 48).

The evidence showed the activities of the wife in the business in keeping records and books, taking care of correspondence, filing of statements and invoices, writing up orders, and when petitioner was away from home taking care of foreign buyers coming to St. Louis, conducting them to factories, seeing that merchandise was shipped, making reservations for buyers, entertaining them and taking care of them in their home, taking care of the office and spending whatever time was necessary in the office, and securing interpretators when necessary (R. 56, 57, 58, 62, 65). The entertainment and guiding of foreign buyers is an important part of the business of selling foreign buyers for export (R. 66, 70, 71). The petitioner made trips to Cuba and Puerto Rico and sold shoes, sometimes accompanied by his wife, and also sold shoes when he was in St. Louis (R. 48, 55). All of the above shows that there was no established business at the start of the partnership and how it was brought up to its present size.

The holding of the court below in applying Section 22 (a) of the Revenue Act, supra, to these facts was to the effect that there was no substantial change in petitioner's economic position, and therefore all of the income of the partnership was taxable to petitioner, citing Helvering v. Clifford, 309 U. S. 331, 336, and Helvering v. Horst, 311 U. S. 112, 119, on the point that income should be taxed to those who earn it. The court also cited Burnet v. Leininger, 285 U. S. 136, 141, in support of its position. None of these cases, nor do any of the other cases cited by the court, have to do with working partnerships such as in the instant case. In Lucas v. Earl, 281 U. S. 111, the court did not deal with a partnership. Burnet v. Leininger, supra, did not deal with such a partnership as the instant case; Helvering v. Horst, supra, nor Helvering v. Clifford, supra, were not partnership cases, therefore, the application of the general principles applied in those cases in the

light of section 22 (a) of the Revenue Act should not be applied in the manner as was done in the instant case.

The change in petitioner's economic position is so plainly apparent in view of the above facts and figures that to hold otherwise would in effect nullify the numerous legitimate family partnerships now in existence, in the light of income taxation. Legitimate labor in partnerships takes the place of capital, but capital cannot take the place of labor in partnerships of this sort. The Tax Court as well as the Court below erroneously assumed that there was an established business at the inception of the partnership.

The Tax Court as well as the Court below assumed that petitioner's wife just drew a $2400.00 salary. Such assumption is not borne out by the record. She never drew just $200 a month (R. 60, 61); the figures referred to above showed nothing drawn in 1933, only $1,106.31 in 1934, only $857.51 in 1935, only $188.39 in 1936, $6,119.41 in 1937, $1,672.00 in 1938, $1,736.04 in 1939, and $6,726.61 in 1940 (R. 98, 99; Petitioner's Exhibit 5, 91).

Therefore we have a far-reaching and important question of federal law affecting family working partnerships which has never been decided by this Court. The facts in this case are so dissimilar to any of the cases cited by the court below that counsel deems it imperative that this Court take jurisdiction and decide this important question. It is important to the numerous family working partnerships now existent in this country; it is important to the Federal Government; it is important by reason of the many differing opinions of other circuit courts of appeal on the question, to which we will hereafter refer. Just to whom is this income taxable? To the various members of the working partnership, or to just one? Today women hold an important position in the business world and their position is increasing in importance as well as in numbers. Where a man has a good business woman as his wife, such as in this case, what better partner could a man have than

his wife? Yet the decision complained of places a penalty on such actions. Therefore the question assumes still larger importance. The fact that it is of importance and is a serious question and requires clarification and decision by this Court, is evidenced by the unusually large number of decisions cited in the opinion of the court below to support its position and the length of time and serious consideration given the case from the date of its submission, November 14, 1944, until the decision was handed down, April 24, 1945, a little over five months later. This is not a question of evasion of taxes, nor does it involve the technical consideration referred to in Helvering v. Clifford, supra, nor does it involve, as mentioned in that case "niceties of verbiage, art of the scrivener, or the legal paraphernalia or the inventive genius of a lawyer." There is nothing in the instant case that even suggests tax evasion, and therefore all those cases dealing with such matters are beside the point.

For the reasons assigned, it is respectfully urged that this Court take jurisdiction and review the decision of the lower court.

2. The court erred in failing to give full faith and credit to the judgment of the Circuit Court of St. Louis County, Missouri.

The wife of petitioner, **when the Commissioner questioned the partnership**, wanted to know her rights as a wife and as a partner (R. 67, 94), and filed a petition in the Circuit Court of St. Louis County, Missouri, to construe and determine her property rights. The partnership agreement (R. 89, Pet. Exhibit 4) was in evidence in that case as well as the various drawings made by the partners, and their joint drawings, through the years (R. 98, 99). The judgment upheld these (R. 105 et seq.) and the judgment was to the effect that each partner had drawn prac-

tically equal amounts of money through the years; that they had bought a home jointly with partnership funds, and that they were equal partners from the date of the partnership agreement, December 15, 1932. On that latter date there was no established business as we have indicated above, and all the business that was done thereafter was produced by the joint efforts of petitioner and his partner as we have shown above. The judgment of the Circuit Court of St. Louis County adjudicated all of the petitioner's property rights in that partnership, which under Missouri law he had a right to contract with his wife as a partner by pooling what little money he had with the wife's labors, as he stated she was continually working with him (R. 48). The Tax Court, in its decision and opinion (R. 23 et seq.), chose to disregard this as did the opinion of the court below.

Petitioner respectfully contends that such holding is contrary to Freuler v. Helvering, 291 U. S. 35, 45; Blair v. Commissioner, 300 U. S. 5-10; Sharp v. Commissioner, 303 U. S. 624. In all of these cases the court held that the judgment of the state court on property rights must be respected and followed and given full faith and credit under the provisions of Article IV, Section 1 of the Constitution of the United States. In fact, in the Sharp case, this court merely wrote a one paragraph per curiam opinion reversing the judgment of the lower court and citing the above cases in support.

The partnership agreement in question was a pooling of the efforts of both partners, in effect an assignment of the future earnings of the partnership, one-half to each partner, and where the facts are present where each worked, as we have indicated above, and built the business from nothing up to its present size, those property rights as adjudged by the Circuit Court of St. Louis County, Missouri, must be respected under the decisions cited above. The import and effect of these decisions can-

not be evaded by the supertechnical construction of the Tax Court and the court below by merely saying that because petitioner sold the shoes that he earned the income. They have singled out just one of the efforts of one of the partners and given no regard whatsoever to the work and efforts of the other partner. Your petitioner respectfully contends that such an artificial construction is not tenable and especially so when there is no holding of tax evasion or any artificial invention in the case.

For the reasons assigned, it is respectfully urged on this point that this Court take jurisdiction and review the decision below.

3. **The decision is contrary to the decisions of other circuit courts of appeal in the same or similarly related partnerships.**

In the case of Commissioner v. Olds, 60 Fed. (2d) 252 (6th), the taxpayer owned a business and entered into a written agreement to sell each of his three daughters a one-fourth interest—each daughter executed her note to him for $400,000. It was stipulated in the agreement that the business should be conducted in his name or any name chosen, and that he would run the business. The Commissioner taxed all the income to the father. The court held that they had a right to make one of the partners the sole agent to conduct the business and that the contract was proper and had been performed, and that neither Lucas v. Earl, supra, or Burnet v. Leininger, supra, controlled, and that the various members of the partnership should be taxed accordingly and not all of the tax placed on the father.

In Armstrong v. Commissioner, 143 Fed. (2d) 700 (10th), taxpayer and his children and mother were partners. Taxpayer had created a trust and given a five per cent of the partnership interest to the trust with a son and daughter

as beneficiary. The Commissioner assessed all the income to the taxpayer; the court held that all of the income was not taxable to taxpayer and distinguished the case from Helvering v. Clifford, supra.

To the same effect is Champlin v. Commissioner, 71 Fed. (2d) 23 (10th).

To the same effect is Hall v. Burnet, 54 Fed. (2d) 443 (C. C. A. D. C.) (Certiorari denied 285 U. S. 552), involving an assignment of insurance commissions to accrue.

In Rose v. Commissioner, 65 Fed. (2d) 616 (6th), taxpayer executed a trust agreement giving certain interests in his partnership to his wife and daughters. The Commissioner assessed all the income against the taxpayer. The court held that the facts in that case were not governed by Lucas v. Earl, supra, and Burnet v. Leininger, supra, and held that all the tax was not taxable to taxpayer, that there was a conveyance of the property which produced the income.

To the same effect is Humphreys v. Commissioner, 88 Fed. (2d) 430 (2nd). In that case two taxpayers and their wives formed a partnership providing for the sharing of profits and losses. The wives contributed some capital, no labor. The Commissioner assessed the two taxpayers on all of the income. Again the court distinguished it from Lucas v. Earl and Burnet v. Leininger, supra, in spite of the fact that all of the money earned was through the efforts of the two taxpayers.

In Commissioner v. Montgomery, 144 Fed. (2d) 313 (5th), a construction engineer had a contract to provide all materials and to perform all work for the construction of a building. He assigned the contract to a corporation formed with his wife and brother and two children. Again the Commissioner taxed all the income to him instead of the corporation. In that case the court distinguished it

from Lucas v. Earl, Burnet v. Leininger and Helvering v. Horst, as well as Helvering v. Clifford, supra, holding that the work he did was for the corporation and that it was not his personal earnings.

In Commissioner v. Giannini, 129 Fed. (2d) 638 (9th), the compensation of the president of a corporation, which the corporation was prepared to pay him and which he had earned and which the president refused to take, was donated to a university by the corporation. The court held that the president was not subject to the income tax thereon, again distinguishing it from Lucas v. Earl and Helvering v. Horst, supra.

In Kell v. Commissioner, 88 Fed. (2d) 453 (5th), a taxpayer turned over a one-fourth interest in a partnership to his wife and children, and the court followed the Rose case, the Olds case and the Champlin case, supra.

In Bowers v. N. Y. Trust Co., 9 Fed. (2d) 548 (2nd), which was decided prior to the decision in Lucas v. Earl, supra, there was a partnership selling agency who was the selling agent for a large number of cotton mills, part of them owned by the taxpayer. The partners agreed that in consideration of the taxpayer giving up his right under the original contract to sixty per cent of the gross receipts, that the partnership would act as selling agent for three of the mills without compensation, the commissions so earned to be paid to such partner taxpayer or his nominees. The court held that commissions paid to the individual partner for services by the partnership was not income of the partnership.

In many of these cases it will be noticed that the court did not tax the individual who by a particular act actually earned the income, and in effect held that there was a change in the taxpayer's economic position.

Now just what must take place to effect a change in a taxpayer's economic position? That is the question that must be answered in this case, and when the rulings of the other circuit courts of appeal on these points are compared with the ruling and decision in the instant case, then your petitioner respectfully submits that it is time for this Court to once and for all settle the question and assume jurisdiction and hand down an authoritative decision on the point. Is the mere fact that petitioner continued to sell shoes to be held determinative of this whole case? Is all the labor that was performed by the wife to be entirely disregarded? We think not. The labor of the wife, combined with the labor of petitioner, was what brought in the income, and it is to the two individuals that the income should be taxed and not alone to the petitioner.

For reasons assigned, it is respectfully urged that this Court take jurisdiction and review the decision of the court below.

4. The court below should have reviewed questions of law or mixed questions of law and fact appearing in the opinion of the Tax Court.

Petitioner contends that the court erred in holding that their field for review was restricted (R. 151). It seems to be well settled law that in matters of this sort the various conclusions and questions involved are questions of law or mixed questions of law and fact, and petitioner therefore contends that the court was in error in holding that the conclusion reached by the Tax Court was binding on them. In Helvering v. Tex. Penn. Oil Co., 300 U. S. 481, 491, this court held:

> "The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the findings of

> primary evidentiary or substantial facts. It is subject to judicial review and on such review the court may substitute its judgment for that of the Board. Helvering v. Ranken, 295 U. S. 123, 79 L. Ed. 1343, 55 Sup. Ct. 732, UBI, supra."

Even the court below, in one of its own opinions, in the case of U. S. v. Pierce, 137 Fed. (2d) 428, at page 431, held to the same effect. It seems that the court in the last mentioned case and in the instant case has held in opposite ways in the respective cases.

Petitioner contends that the finding and judgment is contrary to and unsupported by the evidence, and he so contended in his assignment of errors in his appeal to the Circuit Court of Appeals (R. 40). It became the duty of the Court below to go into the evidence and review it, and to say whether the evidence supported the findings. There was an unwarranted assumption by the Tax Court and by the Court below that there was an established business at the inception of the partnership. Petitioner's business in Cuba had been abandoned and lost, due to political uprisings (R. 47). The partnership was formed and he then began anew, selling in Puerto Rico (R. 48), and later on, when the political situation settled down, he went back to Cuba to sell shoes (R. 48). The decision assumed that the wife just drew $200 a month. **There is no basis for this, as we have shown previously in our argument,** as the entire evidence is contrary to this conclusion.

Petitioner respectfully contends that the decision of the Tax Court on the matters involved was not binding on the appellate court, and therefore their review was not restricted and they should have given force and effect to the other matters presented in the assignment of errors relating to the facts in the case.

5. The decision violates the Fifth Amendment to the Constitution of the United States, in that petitioner is deprived of his property rights without due process of law.

As previously cited to the Court, the undisputed facts show there was no established business at the inception of the partnership. The decision of the court below (R. 145) admits the right of a husband and wife to contract under Missouri law and to form a partnership. We have previously cited to the Court the pages in the record showing that both parties to the partnership contract worked in the business in their respective fields. It is the contention of petitioner that when such facts as these exist that the holding by the court below in adopting in effect the opinion of the Tax Court that the wife contributed no services to the partnership but worked on a salary (R. 32, T. C. opinion) is directly in conflict with the oral evidence which we have referred to above, and directly in conflict to the documentary evidence which we have referred to above, the documentary evidence being the drawings by the parties during the years in the wife's petition in the Circuit Court of St. Louis County (R. 98, 99) and the judgment of the Circuit Court of St. Louis County (R. 105 et seq.).

Such holding by the court below in failing to give force and effect to the partnership contract when the above facts are in the record, denies petitioner the rights to which he is entitled under the contract, and deprives him of his property and his property rights contrary to the Fifth Amendment to the Constitution of the United States which provides that no person shall be deprived of his property without due process of law. That partnership contract cannot be so lightly discarded: It conferred property rights under the evidence and should be given force and effect, and your petitioner, under the law, has the right to its

benefits, and the lower court should have so accorded him. The holding of the court below in this respect is contrary to many of the decisions in other circuits that we have referred to above as to the respect of property rights.

Such ruling in effect prohibits such contracts as in the instant case because they are afforded no force and effect, and therefore the ruling should not be contenanced and should be reviewed by this Court. This proposition seems so fundamental that it requires no citation of authority.

CONCLUSION.

For the reasons assigned this Court is respectfully requested and urged to take jurisdiction and issue its writ of certiorari as requested in the application for the writ.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 138

FRANCIS DOLL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 23–34) is reported at 2 T. C. 276. The opinion of the Circuit Court of Appeals (R. 139–151) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 24, 1945. (R. 151–152.) The petition for a writ of certiorari was filed on June 19, 1945. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Tax Court validly held that all of the income of a business engaged in selling shoes on a commission basis was taxable to the taxpayer notwithstanding the existence of a partnership agreement between taxpayer and his wife.

STATUTES INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 22. GROSS INCOME.
>
> (a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * *
>
> * * * * *
>
> SEC. 181. PARTNERSHIP NOT TAXABLE.
>
> Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.
>
> * * * * *
>
> SEC. 1001. DEFINITIONS.
>
> (a) When used in this Act—
>
> * * * * *
>
> (3) The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, finan-

> cial operation, or venture is carried on, and which is not, within the meaning of this Act, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or oganization.
>
> * * * * *

The same provisions also appear in Sections 22, 181 and 901 of the Revenue Act of 1938, c. 289, 52 Stat. 447, and Sections 22, 181 and 3797 of the Internal Revenue Code (26 U. S. C., Secs. 22, 181 and 3797).

STATEMENT

The pertinent facts as found by the Tax Court (R. 24–31) may be summarized as follows:

Prior to 1932, the taxpayer resided in Cuba and was there engaged in a partnership with his two brothers in selling shoes. Early in 1932 he came to St. Louis, Missouri, having previously married an American citizen, and himself became a citizen. (R. 24–25.)

With his brother-in-law, the taxpayer planned to engage in the business of selling St. Louis beer in Puerto Rico and on January 29, 1932, opened a checking account with the First National Bank in St. Louis under the name of St. Louis Trading Company, upon which both could draw. Since the beer-selling business did not materialize, the arrangement between taxpayer and his brother-in-law was terminated. Taxpayer, however, developed a market for shoes in Puerto Rico and later in

Cuba. He sold the products of more than 40 manufacturers, employing a salesman in Puerto Rico and engaging the services of his brother, Antonio Doll, in Cuba. Contracts with manufacturers were made by the taxpayer personally. Sales were strictly on a commission basis, and checks in payment of commissions were variously issued to taxpayer personally and to the St. Louis Trading Company. (R. 25.)

Continuously from some time in 1932, taxpayer maintained an office in an office building at 1515 Washington Avenue, St. Louis, acting as agent for the owner in the management of the building in lieu of paying rent. His office was equipped with furniture and fixtures and with shelves for sample shoes. Taxpayer also had filing cabinets at his residence in which some business papers were filed. (R. 26.)

Under date of December 15, 1932, a paper entitled "Partnership Agreement" was signed by taxpayer and his wife. This agreement states that taxpayer, being the "sole owner of the Saint Louis Trading Company", agrees to take his wife as partner in his business and Mrs. Doll "accepts to join the partnership of his [sic] husband in the Saint Louis Trading Company enterprise". The agreement describes the nature of the business as being "To sell on strictly commission basis, shoes made by American manufacturers for Export Trade," and provides that both interested

parties are to participate equally in the profits, losses and liabilities of the business. As to management, it is stated the taxpayer will undertake the management of the business "to do as he sees fit," with full authority to appoint agents in foreign territories, and in case of his death, that Mrs. Doll will then undertake the same authority in regard to the management, and "it will be her privilege then, to make the necessary appointments to continue this [business]." (R. 26–27.)

At about the time of this agreement, taxpayer listed the name of the St. Louis Trading Company in the local telephone directory. A cash book was kept in the name of St. Louis Trading Company, but no other books were kept and no proprietorship or other account was set out showing the interest of any persons in the business. (R. 27.) Except for a short period in 1932 or 1933, when Mrs. Doll drew some checks on the bank account which continued to be maintained under the name of the St. Louis Trading Company, all checks on the account were drawn by the taxpayer. An officer of the International Shoe Company, whose shoes were among those sold by the taxpayer, was told by taxpayer and Mrs. Doll, probably during the summer of 1932, that they were operating as a partnership under the name of St. Louis Trading Company. (R. 29.) At no time was there any display of a sign at the business office indicating the conduct of a partnership business. (R. 27.)

Mrs. Doll contributed no capital to the shoe selling business and did not enter into transactions on behalf of the business. (R. 27.) Taxpayer made two or three business trips a year to Cuba and Puerto Rico. Mrs. Doll had, up to the time of the hearing, accompanied him on about four of these trips, during which she helped write orders and rendered other assistance. During taxpayer's absence upon the remaining trips, she worked for the business both in the office and at home. She also helped at the office when Mr. Doll was there and the work grew heavy, checking orders, keeping books, answering letters, and filing papers both at the office and at the residence. She assisted in entertaining customers socially and sometimes accompanied them to the selling offices of shoe manufacturers. Upon such occasions the selling was done by salesmen of the manufacturers. (R. 28.)

Taxpayer's personal expenditures, as well as receipts and expenditures connected with the business, were recorded in the cash book kept in the name of the St. Louis Trading Company. (R. 27.) Taxpayer kept no personal bank account, although Mrs. Doll did. He maintained a separate account, however, for the deposit and disbursement of funds received from customers for payment of freight and of the bills of manufacturers. (R. 29.)

For her services in connection with the business, Mrs. Doll received $200 per month, fixed by

agreement between her and the taxpayer at an apparently early date in the conduct of the business. (R. 28.) There were no annual or other distributions or any setting aside between taxpayer and Mrs. Doll of the income from the shoe-selling business or any crediting of such income to them on the cash book or elsewhere. (R. 27.) For Federal income tax purposes Mrs. Doll consistently reported as her income the $200 per month received as compensation from the business. The taxpayer, as his income, reported the entire income from the business and deducted as a business expense the $200 per month paid to Mrs. Doll. His returns were captioned "Francis Doll, Trading as St. Louis Trading Company." (R. 28.) Matters pertaining to the conduct or disposition of the business upon the death of the taxpayer are covered in his will, the terms of which are not shown of record. (R. 29.)

After the returns for the years 1937, 1938, and 1939 had been filed, the taxpayer employed an accountant named Norton in connection with his income tax matters. Upon learning of the agreement of December 15, 1932, Norton advised the taxpayer and Mrs. Doll that they were entitled to report the income from the shoe-selling business on a basis of 50 percent to each, with consequent saving of Federal income taxes. He prepared partnership returns for the years in question showing the income from the shoe-sell-

ing business as partnership income. He prepared amended returns for both taxpayer and Mrs. Doll, reporting the income from the shoe-selling business in equal shares. The taxpayer filed claims for refund of the difference between the amounts paid as shown on his original returns filed for the years 1937, 1938, and 1939 and the amounts shown on the amended returns prepared by Norton for him. The partnership returns so prepared and filed were captioned "St. Louis Trading Company". (R. 29–30.)

The Commissioner determined deficiencies arising out of matters not in dispute here. In the deficiency notice, filing of the claims for refund by the taxpayer was noted, but no allowance in respect thereto was made. (R. 30.)

On June 13, 1941, the taxpayer filed his petition in this proceeding, the sole error alleged being the Commissioner's failure to find that the taxpayer and Mrs. Doll were equal partners in the shoe-selling business during the taxable years in question and to allow the taxpayer's claims for refunds filed. (R. 30.)

On October 23, 1941, Mrs. Doll filed a petition naming the taxpayer as defendant in the Circuit Court of St. Louis County, Missouri, captioned "Petition to Construe Partnership Agreement Dated December 15, 1932 and to Determine Rights of Plaintiff and Defendant in the Partnership Business, Assets and Profits". On No-

vember 11, 1941, the taxpayer, as defendant, filed his answer to the above petition, admitting all material allegations. Hearing was had on February 25, 1942, and on March 10, 1942, the court entered its findings and decree to the effect that on December 15, 1932, the taxpayer and Mrs. Doll had entered into a partnership agreement under which they were equal partners in carrying on a shoe-selling business, under the name of St. Louis Trading Company; that the agreement was then and had been continuously in full force and effect; that, as partners, each had an equal interest in the assets and profits of the business and each was entitled to equal distributive shares of the profits of the business. No notice was given by the taxpayer or Mrs. Doll to any Federal agency or official that any such proceeding had been instituted. Notwithstanding the proceeding in the Missouri court just described, there was never at any time any dispute or controversy between the taxpayer and Mrs. Doll over the shoe-selling business or the profits therefrom. (R. 30–31.)

The Tax Court held that, from the evidence, it was unable to conclude that the shoe-selling business was conducted as a partnership and decided that there are deficiencies in income tax of $184.17, $153.07 and $170.97 for the calendar years 1937, 1938 and 1939, respectively. (R. 32, 34–35.) The court below affirmed the decision of the Tax Court. (R. 139–152.)

ARGUMENT

1. The court below correctly held that it was the function of the Tax Court to determine from all the evidence whether, in reality, the taxpayer earned the income derived from the business activities carried on, or whether a partnership, composed of the taxpayer and his wife, earned the income as a business entity. *Commissioner* v. *Court Holding Co.*, 324 U. S. 331; *Commissioner* v. *Scottish American Co.*, 323 U. S. 119; *Dobson* v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231. The conclusion turns upon the particular facts, and there is no issue of law involved; for there can scarcely be any quarrel with the principle which was applied, namely, that under Section 22 (a) of the applicable Revenue Acts, *supra*, income is attributable for tax purposes to the person who actually earned it or whose property gave rise to it. *Harrison* v. *Schaffner*, 312 U. S. 579; *Helvering* v. *Eubank*, 311 U. S. 122; *Helvering* v. *Horst*, 311 U. S. 112; *Helvering* v. *Clifford*, 309 U. S. 331; *Burnet* v. *Leininger*, 285 U. S. 136; *Corliss* v. *Bowers*, 281 U. S. 376; *Lucas* v. *Earl*, 281 U. S. 111. In this state of the case, if there is warrant in the record for the conclusion reached by the Tax Court, its decision was binding upon the Circuit Court of Appeals. That court properly limited its review to determining whether there was support for the conclusion in the evidence. *Commissioner* v.

Court Holding Co., supra; Mead v. *Commissioner,* 131 F. 2d 323 (C. C. A. 5th), certiorari denied, 318 U. S. 777; *Tyson* v. *Commissioner,* 146 F. 2d 50 (C. C. A. 8th); *Lorenz* v. *Commissioner,* 148 F. 2d 527 (C. C. A. 6th); *Waldburger* v. *Helvering,* 131 F. 2d 598 (C. C. A. 2d).

The conclusion of the Tax Court was properly based upon the actual substance of the situation in the conduct of the business, and this could not be obscured by the formal arrangements made. *Commissioner* v. *Court Holding Co., supra; Gregory* v. *Helvering,* 293 U. S. 465; *Higgins* v. *Smith,* 308 U. S. 473; *Griffiths* v. *Commissioner,* 308 U. S. 355. Moreover, if the business income was in fact earned by the taxpayer, his tax liability could not be altered by an arrangement to share the income with his wife, whether by assignment, gift, trust, or "partnership" agreement. Having earned the income, taxpayer was liable for the full amount of the tax upon it.

2. The findings of the Tax Court from the evidence are amply supported by the record. With one exception,[1] the petition for certiorari does not assert that any erroneous findings were made by the Tax Court or that there is any lack of founda-

[1] The taxpayer complains of the finding that his wife drew a salary of $2,400 a year and asserts that it is not supported by the record. (Br. 19, 26.) However, both he and his wife testified that that amount was paid to her as salary, that it was so entered on the books of the business, that she reported that amount, and no more, as her income in her tax returns, and that taxpayer took a deduction for that amount as sal-

tion for those findings. The taxpayer also fails to specify in what respects there is an absence of rational basis for the conclusion of the Tax Court that "the income was his [taxpayer's] income." (R. 32.) The meticulous care with which the Circuit Court of Appeals reviewed the evidence to conclude that there was a rational foundation for the Tax Court's decision, makes it unnecessary that those matters be restated here.

3. No conflict in decisions is presented. Some of the cases which the petitioner alleges to be contrary to the decision below (Br. 22–24) have ceased to be authority because of the subsequent decisions of this Court in such cases as *Helvering* v. *Clifford, supra; Harrison* v. *Schaffner, supra; and Helvering* v. *Eubank, supra.* Family partnerships are not immune from the principles established in those cases, as the lower courts have been quick to recognize. Compare *Commissioner* v. *Olds,* 60 F. 2d 252 (C. C. A. 6th) (Br. 22), with *Lorenz* v. *Commissioner, supra; Champlin* v. *Commissioner,* 71 F. 2d 23 (C. C. A. 10th) (Br. 23), with *Losh* v. *Commissioner,* 145 F. 2d 456 (C. C. A. 10th); and *Kell* v. *Commissioner,* 88 F. 2d 453 (C. C. A. 5th)

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aries paid. (R. 47, 48, 60, 68.) The Tax Court, obviously, was not required to give credence to the conflicting testimony that this was only a partial withdrawal of her interest in the partnership profits (R. 60) or that she actually received the amounts which, in the action which was brought for a declaratory judgment, were alleged to have been withdrawn by her (R. 98–99; Pet. Br. 19).

(Br. 24), with *Mead* v. *Commissioner, supra,* and *Argo* v. *Commissioner* (C. C. A. 5th), decided June 20, 1945, not yet reported. The decisions relied on by petitioner, moreover, are distinguishable on their facts. No useful purpose would be served by a discussion of differentiating circumstances in a field where "no one fact is normally decisive," *Helvering* v. *Clifford, supra,* at p. 336; but it should be observed that in many of the cases cited the wife had made a contribution of capital to the partnership, a fact which is not present in this case.

4. The declaratory judgment which the taxpayer's wife obtained in the Circuit Court of St. Louis County, Missouri, defining her rights in the partnership, quite clearly did not affect the tax liability of the parties. Even if it be assumed that there was a valid partnership agreement and that the taxpayer's wife was entitled, under state law, to the rights of a partner, that would not of itself answer the decisive question whether the earnings here were really those of the taxpayer. Thus, no one would deny that a valid trust was created in *Helvering* v. *Clifford, supra,* and that the beneficiaries had acquired enforceable rights; or that in *Lucas* v. *Earl, supra; Helvering* v. *Eubank, supra;* and *Harrison* v. *Schaffner, supra,* there were valid assignments which were effectual as between assignor and assignee; or that there was a valid gift in *Helvering* v. *Horst, supra.* Accord-

ingly, the declaratory judgment did not and could not decide the issues which determine taxability here. The court below did not ignore the declaratory judgment (Pet. Br. 21), but, on the contrary, held that it was not decisive of the Federal question involved. *Estate of Henry W. Putnam* v. *Commissioner,* No. 534, 1944 Term, decided March 26, 1945; *Helvering* v. *Stuart,* 317 U. S. 154; *Lyeth* v. *Hoey,* 305 U. S. 188. There is no departure from understood principles of Federal tax law in this holding.

CONCLUSION

The decision of the court below is correct in all respects. There is no conflict of decisions, and no question of general importance is presented. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1945

U. S. GOVERNMENT PRINTING OFFICE: 1945

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 138

FRANCIS DOLL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

Since the Commissioner on July 14, 1945 filed his brief in opposition to the granting of a writ of certiorari in this case, he has determined to petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Sixth Circuit in *Tower* v. *Commissioner,* 148 F. 2d 388. Although the present case does not involve a situation in which a husband has conveyed an interest in business property to his wife before entering into a partnership agreement with her, as do the *Tower* case and others which

involve a more complex type of family partnership arrangement, the Court may wish to consider the question of certiorari in the two cases together. The present case presents a simpler situation. See also *Tinkoff* v. *Commissioner,* 120 F. 2d 564 (C. C. A. 7); *Waldburger* v. *Helvering,* 131 F. 2d 598 (C. C. A. 2), affirming *per curiam* the decision of the Board of Tax Appeals reported in 1941 P-H B. T. A. Memorandum Decisions, par. 41,438; and cf. Paul, *Partnership in Tax Avoidance,* 13 Geo. Wash. L. Rev. 121, 137. In the present case, unlike the *Tower* case, moreover, the Circuit Court of Appeals has not undertaken, erroneously as we believe, to overrule the decision of the Tax Court upon the question of the genuineness of an alleged family partnership.

Because of the foregoing distinctions and the consequent absence of conflict between the two decisions, although we regard the *Tower* case as one in which certiorari should issue because of the error below and the difficult nature of the problem of family partnerships in which the husband has purported to bestow an interest in business property upon the wife in anticipation of a partnership agreement, we continue to view certiorari as unnecessary in the present case. The Commissioner, however, is not averse to this Court's considering additional phases of the family

partnership problem through granting certiorari in this case if the petition in the *Tower* case should be granted, since family partnerships generally present an important new field of tax avoidance. See Paul, *op. cit., supra.*

Respectfully submitted.

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AUGUST 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945

AUG 30 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 138.

FRANCIS DOLL,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent,

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY MEMORANDUM FOR PETITIONER.

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On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY MEMORANDUM FOR PETITIONER.

The respondent Commissioner of Internal Revenue has filed a "Memorandum For The Respondent," a copy of which we have just received.

In view of the inconsistent position of the respondent which he now takes in his Memorandum, from that expressed in his previous brief, petitioner is constrained to file this reply memorandum.

Respondent states that he has filed petition for certiorari to review the decision in Tower v. Commissioner, 148 Fed. 2d 388 (6th Cir.). He then states that the Court may wish to consider the question of certiorari in the

two cases together; and then he attempts to distinguish the two cases. His distinctions seem extremely tenuous. The only real distinction is the amount involved, as the same fundamental question of taxability in family partnership is in both cases.

Respondent then states that certiorari is unnecessary in the instant case, but that he "is not averse to this Court's considering additional phases of the family partnership problem through granting certiorari in this case if the petition in the Tower case should be granted, since family partnerships generally present an important new field of tax avoidance."

This amounts to a tacit admission that the question involved should be clarified and ruled upon by this Court—contrary to the position which he took in his previous brief filed in opposition to the granting of the writ.

We understand that a petition for certiorari has been filed by the taxpayer to review the decision of the Circuit Court of Appeals for the Third Circuit, in Lusthaus v. Commissioner, 149 Fed. 2d 232, on the same question. In that case there was a vigorous dissenting opinion by Judge Fake in favor of the taxpayer. In the Tower case there was a strong dissenting opinion by Judge Martin in favor of the Commissioner. In the instant case all three Judges concurred.

Such difference of expressed opinion on the same question in three circuits, each approaching and treating the question in a different manner, corroborates the admission of the Commissioner that there exists a problem involving family partnerships that should be clarified and authoritatively ruled upon by this Court through granting of the writ in this and the other cases.

One of the leading taxation analysts and reporting authorities in the United States, Prentice-Hall, in their

Weekly Letter of July 16th, 1945, has this comment on the instant case:

> "Watch for these Supreme Court decisions:
>
> "If the Supreme Court agrees to review the following cases in which the defeated parties have applied for writs of certiorari, it may settle three questions important to taxpayers generally.
>
> "1. Doll v. Commissioner, 8th Cir., 4/12/45: Question presented was whether a family partnership should be recognized for Federal tax purposes. Circuit Court held in favor of Government."

The above quotation emphasizes the importance of the question that should be decided, which is apparent to the Commissioner, the Solicitor General, and the Attorney General, as well as to petitioner and his counsel.

Respectfully submitted,

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